

E-ALERT | International Employment

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CHINA AMENDS ITS LABOUR DISPATCH RULES

New laws governing the use of dispatch workers in the People's Republic of China (the "PRC") came into force on 1 July 2013. In August, the Ministry of Human Resources and Social Security ("MOHRSS") issued a draft rule that set forth for the first time detailed provisions regarding labour dispatch, which have provided helpful clarification for HR agencies and hirers. This E-Alert describes the new legal framework and considers the issues resolved by the new draft rule.

"Labour Dispatch" refers to a hiring arrangement whereby a worker signs an employment contract with a labour dispatch provider (the "HR Agency") and is then leased by the HR Agency to work for another entity (the "Hirer"). Historically, such arrangements have enabled Hirers to take on staff and vendors without increasing headcount.

Over recent years, the Chinese government has promulgated various regulations tightening the administration of labour dispatch - particularly, the *PRC Amended Labour Contract Law* and the new *Implementation Rules on Administrative License for Labour Dispatch*.

KEY PROVISIONS OF THE AMENDED LABOUR CONTRACT LAW AND LICENSE RULES

1. Further restrictions on the use of dispatch workers

One purpose of the Amended Labour Contract Law is to encourage direct employment in the PRC. Previously, dispatch workers could "generally" be used for temporary, auxiliary or back-up positions. Under the Amended Labour Contract Law, dispatch workers may "only" be used for temporary, auxiliary or back-up positions, as defined below:

- "temporary" positions should last no longer than 6 months;
- "auxiliary" positions serve and support the Hirer's core business; and
- "back-up jobs" provide temporary cover for employees on leave (e.g. study leave, holiday or otherwise).

2. Limits on the number of dispatch workers

The Amended Labour Contract Law also stipulates that dispatch workers should not exceed a specified percentage of the total workforce, to be determined by the MOHRSS. However, the specific percentage has yet to be publicly promulgated.

3. Principle of equal pay for equal work

Dispatch workers shall be entitled to "equal pay for equal work" compared with full-time employees holding similar positions with the Hirer.

4. Requirements for the labour dispatch provider

HR Agencies providing labour dispatch services must now satisfy the following requirements in order to obtain a labour dispatch license from the government, including, among others:

- a) registered capital of not less than RMB 2 million/£215K (four times more than the previous requirement);
- b) a permanent business premises and facilities suitable for its business (there is some uncertainty as to what this will mean in practice);
- c) labour dispatch management systems that comply with laws and administrative regulations.

The above qualification requirements are not particularly onerous, and should be easily met by the majority of Chinese labour dispatch companies. However, we understand that over the past few years it has been the Chinese government's policy to limit the number of HR Agencies permitted to provide labour dispatch services. It is therefore expected that HR Agencies that have previously offered labour dispatch services (e.g., FESCO) will likely be able to obtain the new government license. It remains to be seen, however, whether this sector will be open to new entrants.

5. Penalties, and joint and several liability

Labour dispatch providers operating without a license may be subject to a fine of one to five times their illegal gains and may have such gains confiscated; if there are no illegal gains, then the maximum fine will be RMB 50K/£5,400.

Any HR Agency or Hirer that violates the law may be ordered by the local labour bureau to correct the violation within a prescribed period of time. If the violation is not corrected within the prescribed time-frame, then the local labour bureau may issue a fine of between RMB 5K-10K/£500-1K per dispatch worker. In addition, the HR Agency could have its license revoked.

The HR Agency and Hirer may also bear joint and several liability to compensate the dispatch worker(s) for any damage suffered as a result of the violation.

REMAINING QUESTIONS AND THE NEW DRAFT RULE

The new draft rule (if promulgated) will provide further clarity on a number of issues relating to a Hirer's use of dispatch workers:

(1) What is the difference between a labour dispatch service and a labour outsourcing service?

The draft rule implicitly clarifies that the distinction rests on which party manages the staff. If a service provider (e.g., HR Agency) operates the business to lease its employees to work for another entity (i.e., Hirer) and to be directly managed by the Hirer, then it will be a labor dispatch service.

(2) What is the total number of dispatch workers permitted?

The draft rule requires that the total number of staff leased to work in auxiliary position(s) should not exceed 10% of the total number of staff. "Total number of staff" refers to the sum of the number of persons that sign employment contracts with the Hirer, plus the number of staff leased by the HR Agency to work in auxiliary position(s) for the Hirer.

(3) Any exception to the restrictions of "temporary, auxiliary or back-up jobs"?

Lease of staff to a foreign diplomatic representative agency, an organisation of the United Nations, a foreign news agency, a representative office of a foreign enterprise or a foreign financial institution is not subject to the restrictions that leased staff can only work for "temporary, auxiliary or back-up jobs".

(4) How should dispatch staff be paid?

The draft rule reiterates the “equal pay for equal work” principle though it is unclear how “pay” will be interpreted in practice. One MOHRSS official was quoted in a recent news article as stating that MOHRSS had originally intended for “pay” to include such items as welfare and social security payments, but that due to a strong push-back from Chinese companies (including some State-owned enterprises), it is unclear what the future scope of “pay” will include.

(5) What other obligations does a Hirer owe dispatch staff?

A Hirer shall: (i) provide relevant labour protections and conditions; (ii) notify the staff of its work requirements and remunerations; (iii) make overtime working payment, performance-based awards, and welfare related to the position; (iv) provide necessary training; (v) apply normal salary adjustment mechanisms; and (vi) comply with other obligations set forth in laws and regulations.

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